UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

ALTERNATIVE COMMUNITY LIVING d/b/a NEW PASSAGES BEHAVIORAL HEALTH AND REHABILITATION SERVICES

Respondent

and **Case 07-CA-099976**

LOCAL 517M, SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU)

Charging Union

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully submitted,

Rana S. Roumayah
Counsel for the General Counsel
National Labor Relations Board
Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Detroit, MI 48226
Telephone: (313) 226-3216
Facsimile: (313) 226-2090
E-mail: Rana.Roumayah@nlrb.gov

Rana Roumayah, Counsel for the General Counsel, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits its Answering Brief to the Exceptions to the Administrative Law Judge's decision filed by Respondent.

INTRODUCTION

Pursuant to a charge filed by Local 517M, Service Employees International Union (Union), the Regional Director for the Seventh Region of the National Labor Relations Board issued a complaint on October 31, 2013, in the above case against Alternative Community Living, Inc., d/b/a New Passages Behavioral Health and Rehabilitation Services (Respondent). A hearing was conducted in this matter in Detroit, Michigan on May 12 and 13, 2014[1] before Administrative Law Judge Mark Carissimi. Thereafter, ALJ Carissimi issued his decision on July 25, 2014, including Findings of Fact, Conclusions of Law, Remedy, Order and Notice Provisions.[2] ALJ Carissimi found, in part, that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

Specifically, the complaint alleges, and the ALJ found, that Respondent violated Section 8(a)(1) and (5) of the Act by failing to convey to the Union the reasons relied on by the board of directors in refusing to ratify the tentative agreement for a 10-day period, thereby bargaining in bad faith; and implementing its final offer on May 5, 2013, without reaching a valid impasse. The complaint alleges, and the ALJ found, that Respondent violated Section 8(a)(1) of the Act by maintaining the following facially overbroad rules

[1] The ALJD states that the hearing took place on May 13 and 14.
[2] References to the Administrative Law Judge are indicated by ALJ; to the Administrative Law Judge's Decision by Decision or ALJD p.___; to the transcript by Tr ___; to General Counsel Exhibits by GC ___; to Respondent's Exhibits by R ___; and to Joint Exhibits by Jt. ___.

in its personnel handbook: Rule 16.2 Dress Code; Rule 16.11 Solicitation; Rule 16.3 Employee Honesty and Integrity; Rule 16.7 Consumer Confidentiality; Rule 16.9 Media Releases; Rule 16.13 Confidentiality of New Passages Information; Rule 16.4 E-Mail, Voicemail, Intranet and the Internet; Rule 16.15 Facebook, Blogs, Twitter, and any other Social Networks; and Standard 3.2 Proprietary Information and Standard 6.1(b) Respect from Respondent's "Corporate Compliance and Integrity Plan" handbook.

Respondent excepted to the following findings of fact and conclusions of law:

> 1. The ALJ's Conclusion of Law #2(a) that Respondent violated Section 8(a)(5) and (1) of the Act by "failing to inform the Union of the basis for its decision to refuse to ratify the tentative contract between the parties from March 25 to April 4, 2013." (Decision, p. 30);
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> 2. The ALJ's Conclusion of Law #2(b) that Respondent violated Section 8(a)(5) and (1) of the Act by "unilaterally implementing its final contract offer to the Union at a time when the parties were not at a valid impasse in bargaining." (Decision, p. 30); and
>
> 3. The ALJ's Conclusion of Law #3(a), (b), (c), (d) and (e) that Respondent violated Section 8(a)(1) of the Act by maintaining "facially overbroad rules and policies" regarding: (a) the employee dress code; (b) the solicitation and distribution of materials during work time; (c) confidentiality rules; (d) social media guidelines; and (e) policies regarding the disclosure of non-public information and the making of public derogatory statements regarding the Employer. (Decision, p. 30)

SUMMARY OF THE CASE

Respondent is a non-profit corporation that provides services and programs for individuals with mental, developmental and/or physical disabilities, and the elderly. Since 2007, the Union has represented approximately 300-350 direct care workers at about 33 group homes, spanning 11 counties in southeast Michigan. (Tr. 35-36) (Jt. 2)

Jamie Bragg-Lovejoy, Director of Operations for Respondent, was a member of Respondent's bargaining team from 2007 to 2009, during the first contract negotiations. (Tr. 274) Priscilla Horde is the Talent Manager for Respondent, and she joined Respondent's bargaining team on December 8, 2011, during the successor contract negotiations. (Tr. 303-304) Daniel Gwinn is an attorney, who served as a member of Respondent's bargaining team for both contracts. (Tr. 325-326)

Daniel Renner is a Labor Relations Specialist and served as the chief negotiator for the Union during negotiations for the first collective bargaining agreement, which was effective from December 2, 2009 to December 2, 2011. Beginning October 2011, Renner served as chief negotiator for the Union during negotiations for the successor contract. The parties agreed that the 2009 CBA would remain in effect until a new agreement was reached. (Jt. 3) Sascha Eisner is an organizing coordinator, employed by the International Union. In December 2012, he was assigned to assist the Local Union with its negotiations, as the Michigan Freedom to Work law was moving through the state legislature. (Tr. 166-167) (Jt. 1)

The parties met for bargaining about twelve times through the course of the next seventeen months, from October 2011 to March 2013. (Tr. 43) In December 2012, a "Freedom to Work" law was passed in Michigan, prohibiting employers and labor organizations from agreeing to require employees to pay union dues as a condition of employment. (Jt. 1) The law provided for a several month grace period, as the law was to apply only to agreements that "take effect or [are] extended or renewed" after the law's effective date of March 28, 2013. (Jt. 1) In an effort to facilitate negotiations and reach a

contract before that date, the Union brought in Sascha Eisner as an additional negotiator. (Tr. 44)

During the bargaining session on January 24, 2013, there was movement from both parties, and some tentative agreements were reached. (Tr. 168) The parties were scheduled to bargain again on February 27, 2013, but Respondent cancelled one day prior because snow was in the forecast. (Tr. 169) Even as Michigan's Freedom to Work law deadline was quickly approaching, the parties suffered a seven-week hiatus between bargaining sessions.

The parties eventually met on March 14, 2013. (Tr. 169) During this meeting, Eisner point-blank asked Respondent if it was intentionally dragging its feet to get past the Michigan Freedom to Work law deadline, or was it really interested in reaching an agreement. (Tr. 170) Gwinn testified, "…we [have] no position on that…we have no interest in bringing down your house…we are here to put forth the Employer's objectives and carry out this negotiation and accomplish what we have been charged to do." (Tr. 341) By the end of this meeting, the parties reached a complete tentative agreement, which the Union described as a major compromise, in financial and other terms, in order to retain union security prior to the Freedom to Work deadline. (Tr. 171) The tentative agreement was signed by Renner and Horde on March 14, and the parties shook hands to commemorate the deal. (Tr. 171) (GC 7)

On March 15, 2013, Gwinn, Horde and Renner participated in two conference calls, in which the details regarding various provisions were hammered out. (Tr. 52) Also during those calls, Renner reiterated the timeliness constraints the Union was

working under so that its members could vote on the tentative agreement before the Freedom to Work deadline.

In a letter dated March 21, 2013, one full week after the parties signed the tentative agreement, Respondent notified the Union that its board of directors would be voting on the contract on March 25. (R 9) On March 25, the Union's membership overwhelmingly ratified the tentative agreement, and Renner notified Horde and Gwinn of such, via e-mail that same date at 3:53 p.m. (Tr. 52) (R 10)

The board of directors met from 3:30 p.m. to 4:15 p.m. on March 25. (GC 16) Having not heard back from Respondent on March 25, Renner sent another e-mail to Horde and Gwinn on March 26 at 7:49 a.m., repeating that the members had ratified the contract, and asking if the board had also ratified. (R 11) At 9:48 a.m., Horde responded via e-mail that she was awaiting feedback and would let the Union know as soon as she heard. (R 12) Respondent remained silent for the next three hours, so Renner sent yet another e-mail on March 26 at 12:36 p.m. to Horde and Gwinn, asking if the Union would know by the end of the day, as they were approaching the Freedom to Work deadline (March 27 at midnight). (R 12) Gwinn finally responded via e-mail to Renner at 3:58 p.m. (almost a full 24 hours after the board of directors met), indicating that the board of directors voted not to ratify the proposed collective bargaining agreement, and that they have additional work to do at the bargaining table. (GC 9) Upon receiving this e-mail, Renner testified that he was surprised and dumbfounded, and decided to immediately call Gwinn. (Tr. 55) Renner asked Gwinn what happened. Gwinn, who did not attend the board of directors meeting, curtly responded that he was directed to send

the e-mail, and that was all he could tell Renner. (Tr. 55, 350, 365) The Union responded via e-mail on March 26 at 5:04 p.m. that it was available to meet on March 27 for continued contract talks, in hopes of squeaking by the March 28 Freedom to Work deadline. (GC 10) That same evening on March 26, at 9:58 p.m., having received no response to its earlier e-mail, Renner sent another e-mail to Horde, Gwinn and Bragg-Lovejoy. He stated the Union's position was that an agreement was reached on March 14, 2013. The Union offered to meet on March 27, in an attempt to execute a tentative agreement before the Freedom to Work deadline. Respondent did not respond at all.

On March 27, at 5:21 p.m., Union attorney Amy Bachelder emailed Gwinn, indicating that she was baffled by Respondent's complete reversal of direction with regard to the March 14, 2013, agreement, and asked what Respondent's objection was. She also proposed to meet on March 28. (GC 12) On March 28 at 12:44 p.m., Bachelder e-mailed Gwinn, asking why Respondent's board of directors rejected the contract, and if it had anything to do with the Freedom to Work law. (GC 14) That same evening at 7:14 p.m., Bachelder sent Gwinn another e-mail, expressing her frustration over Respondent's deafening silence and lack of response. (GC 14)

On April 3, 2013, Renner sent Bragg-Lovejoy and Horde a letter requesting all documents concerning Respondent's board of directors' actions with respect to the March 14, 2013 agreement. (GC 15) On April 4, ten days after the board of directors voted not to ratify the agreement, Gwinn sent the Union a letter, and attached a copy of the board of

directors' meeting minutes. Respondent's letter indicated that there was no final collective bargaining agreement, and that Respondent requested to bargain. (GC 16)

The board of directors' meeting minutes reveal that the "board expressed strong overall satisfaction with the terms and conditions of the proposed agreement." (GC 16) (Tr. 238) They, however, "expressed serious reservations about… its impact in relation to the fast-approaching effective date of Michigan's Freedom to Work Act." (GC 16) The board considered that "ratification of a proposed collective bargaining agreement incorporating the provisions of the Freedom to Work Act could serve to positively position the Company as aligned with legislative intent and put the Company in a more favorable position." (GC 16) Accordingly, the board unanimously voted to reject the contract and "present a counter-proposal to the Union incorporating all of the terms of the proposed agreement except to revise those sections of the agreement that would be in conflict with Michigan's Freedom to Work Act." (GC 16)

In a letter dated April 12, 2013, Renner informed Bragg-Lovejoy that "the Union is meeting in response to your request to do so and will bargain in good faith without condition with respect to its continuing obligation to bargain as to all matters not encompassed by a collective bargaining agreement." (GC 17) Renner reaffirmed the Union's position that it already had a binding contract with Respondent, as of March 14, 2013. (GC 17) The letter further clarified that any proposals made, discussed, or tentatively agreed to, were contingent upon events with respect to the pending unfair labor practice charge. (GC 17)

The parties met on April 17, 2013. Eisner relayed the Union's position that it had a binding tentative agreement that was signed on March 14. (Tr. 175-176). Eisner differentiated the current situation from the board of directors' "concerns" by pointing out that the state legislature was considering sanctions only against public educational institutions that were administering "hurried, last minute agreements" and "extending contracts" to circumvent the law. (Tr. 177) Eisner noted that the parties had been engaged in good faith negotiations for the past fifteen months, and that Respondent was a private sector organization. (Tr. 178) After a discussion about how Respondent was displeased with the Union's latest unfair labor practice charge, Eisner proposed to Respondent that since the law's effective date had passed and the alleged threat from legislators was gone, that Respondent reinstate the March 14 agreement, and the Union would withdraw its charge. (Tr. 178) Without consideration or relaying this offer to the board of directors, Gwinn presented a package proposal that represented Respondent's final, best and last offer, which it deemed in accordance with the new Michigan Freedom to Work law. (Tr. 176) (GC 18) Respondent prematurely declared impasse, gave the Union until May 3, 2013 to consider the final, best and last offer, and informed the Union that it would implement such offer on May 4th or May 5th. (GC 18) The final, best and last offer differs from the March 14, 2013, tentative agreement in two ways: (1) it eliminates the union security clause, and (2) it extends the contract's duration by one month. (Tr. 69) After Respondent made its final, best and last offer, the Union raised topics of bargaining it had previously abandoned or taken deep concessions on, in a compromising effort to reach an agreement with a union security provision before the

Freedom to Work law went into effect. For example, the Union discussed wages, earned time off provisions for part-time employees, paid holidays and incorporating an arbitration clause. (Tr. 70)

In a letter dated April 20, 2013, addressed to Bragg-Lovejoy and Horde, Renner indicated that the Union was reviewing Respondent's final offer, and the Union was preparing counter proposals which were responsive to the changed circumstances. Renner further stated that the parties were not at impasse, and that they would be meeting again to bargain on May 10. (GC 20) Despite this attempt by the Union to continue negotiating with Respondent, its board of directors voted to implement the final, best and last offer on May 3. (GC 21)

The parties met one final time on May 10, 2013. The Union presented its counterproposals, which Respondent rejected. (Tr. 183-184) Eisner contested how the parties could possibly be at impasse when they were still bargaining. (Tr. 74-75) The parties also discussed the pending unfair labor practice charge, and Gwinn indicated that he would not negotiate any further until the unfair labor practice charge was withdrawn. (Tr. 75, 183)

With respect to Respondent's maintenance of unlawful rules, since at least September 2012, Respondent has maintained its Personnel handbook and Corporate Compliance and Integrity Plan handbook (hereafter rules). These rules were distributed to the employees in the bargaining unit and to all newly hired employees during their orientation process. A copy of the rules was also available at each facility. (GC 2)

These rules were effective until about September 7, 2013, when they were rescinded by Respondent. Employees were notified of the implementation of new rules on the same date. (Tr. 14) (GC 2) The new rules are not at issue in this proceeding.

ARGUMENT

I. ALJ CARISSIMI CORRECTLY FOUND, AS A MATTER OF LAW, THAT RESPONDENT VIOLATED SECTION 8(A)(5) AND (1) OF THE ACT WHEN IT FAILED TO INFORM THE UNION OF THE BASIS FOR ITS DECISION TO REFUSE TO RATIFY THE TENTATIVE AGREEMENT FROM MARCH 25 TO APRIL 4, 2013 (Exception 1)

Respondent violated the Act when it embarked on a course of bad faith bargaining after reaching a tentative agreement with the Union on March 14. In ***Valley Central Emergency Veterinary Hospital*****,** 349 NLRB at 1127, the Board noted, as a factor supporting a finding of bad faith, that that the employer failed to promptly notify the union of its reason for not ratifying a tentative agreement. When an employer rejects a tentative agreement without providing an explanation that is at least logical, fact-based, and timely, the parties cannot resume meaningful bargaining. Moreover, the absence of good cause under these circumstances suggests that Respondent's real motivation was to delay bargaining or avoid reaching an agreement. ***Id.*** at 1127 In ***Transit Service Corp.***, 312 NLRB 477, 484 (1993), the employer's withdrawal from a tentative agreement was unlawful where it was intended to cause delay.

Although union security was **never** a subject of negotiations about which either party had proposed a change in its existing contract language, the board of directors'

minutes reflect that their rejection of the proposed contract was due to "concern" about funding which it hyperbolically characterized as "recent and sudden escalation of threats of severe sanctions against organizations where ratification of proposed collective bargaining agreements could be perceived as an intentional effort to circumvent the intent of the legislature and Michigan public policy." In any event, regardless of the merits of its reasons for refusing to execute the March 14 Agreement, the ALJ correctly found that Respondent frustrated the collective bargaining process by refusing to timely communicate those reasons to the Union. When the parties reached a tentative agreement on March 14, and during the conference call on March 15, the Union emphasized that time was of the essence. Nonetheless, after its board voted against ratification on March 25, Respondent waited nearly a full 24 hours to even notify the Union of that result, despite multiple Union requests for that information. Respondent then refused to tell the Union that union security was the basis for its decision until, as a matter of state law, the issue was no longer open to negotiation. These actions are a far cry from good faith bargaining.

Respondent has offered no legitimate explanation for this conduct. In the days following March 25, Respondent's negotiators told the Union at first that its board had not informed them of its decision, and then that it had not communicated its reasoning. Plainly, however, a principal cannot escape its duty to bargain in good faith by keeping its agent in the dark. See ***Kansas Van & Storage Co.***, 273 NLRB 855, 863 (1984), where "An employer who hires a negotiator-attorney is not excused from the statutory

requirement to meet at reasonable times and confer in good faith." The chief employer negotiator claimed, at times, that his busy schedule was preventing him from responding to the Union. But "[t]he Act does not permit a party to hide behind the crowded calendar of the negotiator whom it selects." ***Sarasota Coca-Cola Bottling Co.***, 162 NLRB 38, 46 (1966), *enfd. sub nom.* ***NLRB v. Bradenton Coca-Cola Bottling Co***., 402 F.2d 84 (5th Cir. 1968). In collective bargaining, an employer must "'display a degree of diligence and promptness . . . comparable to that which [the employer] would display in [its] other business affairs of importance.'" ***Barclay Caterers***, ***Inc.,*** 308 NLRB 1025, 1035 (1992) (quoting ***J.H. Rutter-Rex, Inc***., 86 NLRB 470, 506 (1949)). In light of the exigent circumstances of which Respondent and its representatives were well aware, Respondent did not act with such diligence here. While Respondent's delay lasted only a matter of days, it came during a period the parties well knew to be critical. In ***Transit Service Corp***., 312 NLRB at 483-84, an employer unlawfully withdrew a proposal in an attempt to delay reaching agreement until certification year had ended so that a decertification petition could be processed. Under the circumstances of this case, Respondent's failure to promptly convey its board's decision and reasoning was clearly done with the mal-intent of eliminating union security. See ***NLRB v. Albion Corp.***, 593 F.2d 936, 939-40 (10th Cir. 1979), upholding the Board's finding of a refusal to bargain because although the employer's "outright refusal to bargain lasted only five days, . . . [w]hile the time was short, the refusal came at a critical period just prior to the expiration of the contract and in the face of a threatened strike." In ***NLRB v. Mayes Bros., Inc.***, 383 F.2d 242, 246 (5th Cir. 1967), "[The employer's] failure either to sign the agreement or to advise the [u]nion

why it would not sign is inconsistent with any sincere intention to compose differences without unnecessary delay and therefore is not good faith bargaining." Accordingly, Respondent cannot show good cause for its delay in relaying the decision and reasoning of the board of director's refusal to ratify, and its conduct amounts to bad-faith bargaining.

On March 26, at 3:58 p.m., the Union first learned that the board of directors refused to ratify the tentative agreement. The Union responded via e-mail at 5:04 p.m. **that it was available to meet on March 27 for continued contract talks**, in hopes of squeaking by the March 28 Freedom to Work deadline. (GC 10) That same evening on March 26, at 9:58 p.m., **having received no response** to its earlier e-mail, Renner sent another e-mail to Horde, Gwinn and Bragg-Lovejoy. He stated the Union's position was that an agreement was reached on March 14, 2013, and that if Respondent did not indicate that it would execute that agreement, the Union would file an unfair labor practice charge. Contrary to Respondent's assertions in its exceptions, this did not "shut off bargaining between the parties." It was not a "message that the Union was unwilling to bargain." To the contrary, it was a message that the Union wanted to meet in hopes of understanding Respondent's reasoning for its reversal of position, which still had not been communicated to the Union. It was a message that the Union wanted to meet and bargain so that an unfair labor practice charge would not need to be filed. It was a message that the Union wanted to meet and bargain so that an agreement could be reached before the March 28 Freedom to Work deadline.

The Union and its attorney persisted with several e-mails to Respondent. What followed was a deafening silence from Respondent during the entire day of March 27, clearly the most critical day for Respondent to communicate with the Union. Respondent asserts on page 13 of its exceptions, "Any meeting during March 26th or 27th would have been futile based on the Union's intransigent, and ultimately erroneous, position that the Employer must execute the agreement." This is simply not true, as the Union stood ready to meet and understand Respondent's reasoning for the board of director's decision not to ratify, before the Freedom to Work law was implemented. The ALJ correctly found, as a matter of law, that Respondent failed to bargain in good faith with the Union by refusing to meet and relate the basis for its decision not to ratify the tentative agreement, during a critically time-sensitive period. (ALJD p. 18)

II. ALJ CARISSIMI CORRECTLY FOUND, AS A MATTER OF LAW, THAT RESPONDENT VIOLATED SECTION 8(A)(5) AND (1) OF THE ACT WHEN RESPONDENT IMPLEMENTED ITS LAST, BEST AND FINAL OFFER ON MAY 5, 2013, BEFORE REACHING A LAWFUL IMPASSE. (Exception 2)

Respondent claims that it was justified in implementing its last best offer because the parties were at impasse, and thus, it has the burden to prove that the parties were at impasse. ***PRC Recording Co.***, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987). The Board, in determining if an impasse exists, has found that the decision is a judgment call based on the facts of the case. ***Taft Broadcasting Co. WDAF AM-FM TV***, 163 NLRB 475, 478 (1967). The Board created a non-exclusive list of factors to help determine when an impasse occurs between bargaining parties. These factors include [1]

the bargaining history of the parties, [2] the good faith of the parties in negotiations, [3] the length of the negotiations, [4] the importance of the issue or issues as to which there is disagreement, and [5] the contemporaneous understanding of the parties as to the state of negotiations. ***Id.*** "For an impasse to occur, neither party must be willing to compromise." ***Day Automotive Group and Centennial Chevrolet, Inc.***, 348 NLRB 1257, 1264 (2006).

When looking at the factors, the most telling is that Respondent did not act in good faith during negotiations. On April 17, 2013, there was no evidence that the parties were at impasse. Respondent had rejected the tentative agreement and presented a new proposal which was identical to the rejected tentative agreement, except that it removed the union security clause and extended the term date by one month. Without discussion, Respondent declared impasse. "A lawful impasse occurs when good faith negotiations have exhausted the prospects of concluding an agreement." ***Erie Brush & Mfg. Corp. v. NLRB,*** 700 F. 3d 17, 20 (D.C. Cir. 2012), citing ***Wycoff Steel,*** 303 NLRB 517 (1991). Respondent demonstrated an unwillingness to bargain in good faith when it rejected the March 14 agreement without relaying the reasons to the Union in a timely manner, and then refused to negotiate with the Union regarding union security on the critical dates of March 26 and 27. Respondent made a regressive proposal, which did not contain a union security clause, when the Union had previously made concessions on issues such as earned time off for part-time employees, grievance procedures, paid holidays and more, just to retain a union security clause. Respondent's refusal to promptly notify the Union of its reasons not to ratify the March 14 agreement, its failure and refusal to meet on the

critical dates of March 26 and 27, and its unlawful imposition of its final offer on May 5 are all further evidence of bad faith.

Respondent also acted in bad faith when it refused to respond to the Union's proposal because the Union had an active unfair labor practice charge. Respondent refused to bargain with the Union until the Union withdrew its charge. Refusing to consider the other parties' proposals is evidence that there is no impasse. See ***Day Automotive Group***, supra at 1264; ***Wycoff Steel***, supra at 523 (1991). Even if a Union has nothing new to bring to negotiations, a respondent has an obligation to bargain. ***Carey Salt Co.***, 358 NLRB No. 124, at slip op. at 26 (2012). The ALJ properly rejected Respondent's argument that because the Union expressed the position that any tentative agreements reached in the bargaining that began on April 17 were contingent upon a decision by the NLRB regarding whether the parties reached a binding contract on March 14, 2013, the Union refused to bargain and therefore the parties were deadlocked. (ALJD p. 21). Rather, it was Respondent's counsel who unlawfully threatened that he refused to bargain until the Union withdrew its charge. (Tr. 75, 183)

On page 15 of its exceptions, Respondent contends, "On May 10, 2013, the Union raised a 'wish list' of issues that had already been rejected in prior bargaining sessions and for which no new supporting rationale had been presented." Although they had been rejected during previous sessions, this 'wish list' of issues, more commonly known as bargaining proposals, was presented to Respondent because the landscape had now been drastically changed since there was no longer a union security clause. The ALJ

correctly found that Respondent's unilateral removal of this important provision, coupled with its unwillingness to consider discussing other issues to substitute for the loss of that provision, is not indicative of a serious effort to reach a mutually acceptable agreement. (ALJD p. 21) Respondent implemented its final offer on May 5, 2013, without reaching a valid impasse and therefore violated Section 8(a)(5) and (1) of the Act.

III. ALJ CARISSIMI CORRECTLY FOUND, AS A MATTER OF LAW, THAT RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY MAINTAINING FACIALLY OVERBROAD RULES

On page 16 of its exceptions, Respondent contends that, "The Union presented no evidence that any employee had been disciplined during the period from September, 2012, through September 7, 2013, when the allegedly overbroad provisions were implemented. In ***Lafayette Park Hotel,*** 326 NLRB 824 (1998), the Board held that an employer may violate Section 8(a)(1) of the Act through the maintenance of work rules even in the absence of enforcement. The appropriate inquiry is whether the rule in question would reasonably tend to chill employee protected concerted activity covered in Section 7 of the Act. In determining whether a rule is unlawful, the Board must give the rule a reasonable reading. ***Id.*** at 825**.** When a rule may reasonably be read by employees to have a chilling effect on their Section 7 rights, an employer's mere maintenance of the rule violates the Act, and the General Counsel need not prove enforcement, actual chilling effect, or bad motive. ***MasTec Advanced Technologies***, 357 NLRB No. 17, JD slip op. at 14 (2011).

The Board has developed a two-step inquiry to determine if a work rule has a chilling effect. First, the rule is clearly unlawful if it explicitly restricts protected concerted activities. Second, if the rule does not explicitly restrict protected concerted activities, it violates Section 8(a)(1) if: (a) employees would reasonably construe the language to prohibit protected concerted activity; (b) the rule was promulgated in response to protected concerted activity; or (c) the rule has been applied to restrict such activity. ***Lutheran Heritage Village - Livonia,*** 343 NLRB 646, 647 (2004).

The second-stage inquiries are listed in the disjunctive, and are separable and independent. As the Board stated in ***Lutheran Heritage,*** a violation is found on a showing of only one of the three. ***Id.*** As explained at the beginning of the hearing, the General Counsel's theory of the instant case arises under scenario (a) of the second-stage analysis –that is Respondent is violating Section 8(a)(1) of the Act by maintaining the challenged portions of the rules, because employees would reasonably construe the disputed language to prohibit Section 7 activity.

Respondent's argument that the absence of evidence from the Union that any employees had been disciplined under these rules negates their unlawfulness, is completely without merit. While it is true that the Respondent voluntarily rescinded its rules, the maintenance and promulgation of those unlawful rules from at least September 2012 until their rescission on about September 7, 2013, violates Section 8(a)(1).

On pages 16 and 17 of its exceptions, Respondent also argues, without support, that, "Any violation found after the Employer's voluntary action in rescinding its policies would have a chilling effect on future efforts by employers to resolve such matters

without resorting to litigation." This perplexing argument is simply without merit and does not take into any consideration the chilling effect upon employees to act within their Section 7 rights during the maintenance of the unlawful rules. Even though the rules have been rescinded, the employees have a right to a Board Notice Posting, clearly outlining which rules were found to be facially overly broad. Respondent, at no time during the hearing, in its post-hearing brief or in its exceptions, raised any specific defenses to the rules the ALJ found to be unlawful. Thus, the ALJ's findings of law regarding the unlawful rules should be affirmed.

CONCLUSION

For the reasons set forth above and in the Administrative Law Judge's Decision, it is urged that Respondent's Exceptions be denied in their entirety. It is further requested that the Board affirm the ALJ's findings of fact, conclusions of law, and recommended Remedy and Order.

Respectfully submitted this 18th day of September, 2014.

/s/ Rana S. Roumayah
Rana S. Roumayah
Counsel for the General Counsel
National Labor Relations Board
Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Detroit, MI 48226
Telephone: (313) 226-3216
Facsimile: (313) 226-2090
E-mail: Rana.Roumayah@nlrb.gov

CERTIFICATE OF SERVICE

I certify that on September 18, 2014, I caused copies of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision, in ***Alternative Community Living d/b/a New Passages Behavioral Health and Rehabilitation Services, Case 07-CA-099976,*** to be served upon all parties of record, by electronic transmission, as follows:

Respondent:

Gregory Bator, Attorney
Bator Legal, P.C.
400 West Maple Road
Birmingham, MI 48009
E-mail: Gregory@batorlegal.com

Charging Union:

Sascha Eisner
E-mail: Sascha.Eisner@seiu.org

/s/ Rana S. Roumayah

Rana S. Roumayah
Counsel for the General Counsel
National Labor Relations Board
Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Detroit, MI 48226
Telephone: (313) 226-3216
Facsimile: (313) 226-2090
E-mail: Rana.Roumayah@nlrb.gov